

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION Nos. 99 and 524 of 1997

with

COMPANY APPLICATION Nos.189, 205 & 559 of 1997

with

COMPANY APPLICATION No 403 of 1998

All in

COMPANY PETITION No 66 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE Sd/-

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?

No

RUSHVI ESTATE & INVESTMENTS PVT.LTD.

Versus

O.L. OF SHRI AMBICA MILLS LTD.

Appearance:

MR KG VAKHARIA Sr Advocate with MR TUSHAR MEHTA
and MR DS NANAVATI for Rushvi Estate & Investments
Pvt. Ltd.

MR SN SOPARKAR with MR DS NANAVATI for Rutuja Estate
& Investments Pvt. Ltd.

MR MG NAGARKAR for Jain Corporation.

MR ASHOK L SHAH for Official Liquidator (Resp. No.1)

MR MB BUCH for ICICI

MR RM DESAI for IDBI

MR JT TRIVEDI for Bank of India & Union Bank of
India

MR THAKER for Oil & Natural Gas Commission

CORAM : MR.JUSTICE H.L.GOKHALE
Date of decision: 26/11/98

ORAL JUDGEMENT

Company Application No.99 of 1997 and Company Application No.524 of 1997 are filed by one Rushvi Estate & Investment Pvt. Ltd. (hereinafter referred to as Rushvi Ltd.). Company Applications Nos.189 of 1997, 205 of 1997 and 559 of 1997 are filed by one Rutuja Estate & Investment Pvt. Ltd. (hereinafter referred to as Rutuja Ltd.) and Company Application No.403 of 1998 is filed by one Jain Corporation. All these applications are filed against the Official Liquidator of M/s. Shri Ambica Mills Ltd. which is in winding up. Various secured creditors have also joined in these proceedings as respondents.

2. Mr.K.G.Vakharia Senior Advocate with Mr.Tushar Mehta with Mr.D.S.Nanavati have appeared for Rushvi Ltd. Mr.S.N.Soparkar with Mr.D.S.Nanavati have appeared for Rutuja Ltd. and Mr. M.G.Nagarkar has appeared for Jain Corporation. Mr.Ashok L.Shah has appeared for the Official Liquidator. Mr.M.B.Buch has appeared for ICICI; Mr.R.M.Desai has appeared for IDBI; Mr.J.T.Trivedi has appeared for Bank of India and Union Bank of India who are all secured creditors. Mr.Thakar has appeared for ONGC which has also a substantial claim against the company in winding up and Mr.D.S.Vasavada has appeared for the Textile Labour Association which represents the workers of the erstwhile Mill Company.

3. Company Petition No.66 of 1988 was filed on 12th April 1988 for winding up Shri Ambica Mills Ltd. During the pendency of that petition, the affairs of this company were investigated before the Board of Industrial Finance & Reconstruction (BIFR) and after obtaining the opinion from the said Board, winding up order came to be passed on 17.1.1997. This Mill Company is having its properties amongst others situated at four places:-

- (1) Unit No.1 which is situated in the Kokhra area of Ahmedabad (We are concerned with the property of this Unit in all these applications).
- (2) Unit No.2 which is situated near Railway Line.

(3) A textile mill at Baroda, and

(4) M/s. Ambica Tubes Division situated at
Vatva.

4. After passing of the winding up order, the Official Liquidator has taken possession of the properties other than the one at serial No.3 above. The possession of the property at serial No.1, with which we are concerned in this matter, was taken on 21st March 1997. As far as the property at Baroda is concerned, it is contended by the purchaser of that undertaking, namely, one Sunil Mill, that the mill has been made functional and some workers are working therein and because of an order passed by this court in Company Application No.143 of 1997, the Official Liquidator has not taken possession of that property. The property of Mill No.1 is situated in three different town planning schemes numbered as T.P.Scheme No.7, 16 and 9, the details of which are as follows:

T.P.Scheme No.	Final Plot No.	Area in Sq.Mtrs.
7	2	56,542
	(-) 5,810 (Chem. Divn.)	
	50,732 Lease-hold	
3	585 "	
6	1,169	
		52,486
16	304	74,457 Partly lease -hold
307	9,207	
	83,664	
9	58/59	25,901

5. The two Company Applications Nos.99 of 1997 and 524 of 1997 filed by Rushvi Ltd. contend that, final plot No.307 of T.P. Scheme No.16 had been sold by the erstwhile management of Shri Ambica Mills Ltd. to the applicant company by a deed of conveyance. The applicants have prayed in Application No.99 of 1997 for lifting the attachment made by the Official Liquidator on the said property being final plot No.307 of the T.P.Scheme No.16. Application No.524 of 1997 seeks a declaration that the purchase of land of final plot No.307 of T.P.Scheme No.16 admeasuring 9207 square metres

approximately (together with all staff quarters, out-house, godowns, bungalow etc.) is legal and valid and that the applicant is a bona fide purchaser for value of that property.

6. Company Applications Nos.189 of 1997, 205 of 1997 and 559 of 1997 filed by Rutuja Ltd. are concerning a parcel of land from final plot No.2 of T.P.Scheme No.7 admeasuring 9215 square metres. It is contended by the applicant that they are bona fide purchasers for value of this parcel of land. Company Application No.189 of 1997 prays for a direction to lift the attachment made by the Official Liquidator on the said property situated in final plot No.2 of T.P.Scheme No.7. Company Application No.205 of 1997 seeks leave to file a suit against Shri Ambica Mills Ltd. for a declaration that the plaintiff is the absolute owner of the leasehold rights in respect of the property conveyed to the applicant. Application No.559 of 1997 prays for a declaration that the applicant is a bona fide purchaser for value without notice of that property.

7. Company Application No.403 of 1998 filed by Jain Corporation is concerning a parcel of land situated at final plot No.6 of T.P.Scheme No.7 admeasuring 1169 square metres. This applicant also claims to be a bona fide purchaser for value and prays that the applicant may be put in actual possession of the land in question and also seeks a declaration that the applicant is the absolute owner of the leasehold rights of the said property.

8. M/s. Rushvi Ltd. principally contended in support of the aforesaid prayers that they have entered into an agreement to purchase the aforesaid parcel of land on 14th June 1988 with Shri Ambica Mills Ltd. That parcel of land was to be purchased at the rate of Rs.650 per square metre for an aggregate value of Rs.59,84,550. It is stated that at the time of execution of the said agreement the applicant made a payment of Rs.5,98,455 as earnest money by a cheque dated 14th June 1988. That agreement has been duly registered with the Sub-Registrar of Assurances, Ahmedabad. Subsequently, out of the balance amount, an amount of Rs.48,87,254 was claimed to have been paid in June 1990 by a cheque drawn in the name of the company and the remaining amount was paid in cash. It is further stated in Company Application No.99 of 1997 that the permission for sale as required under the provisions of the Urban Land (Ceiling & Regulations) Act, 1976 was obtained. Thereafter, a regular conveyance has been executed on 11th March 1993 which has been duly

registered with the Sub-Registrar of Assurances at Ahmedabad. It is further stated that the land has been transferred in the name of the applicant in revenue records as well as municipal records. The applicants claim to have submitted plans for development of that land for construction of shops and industrial estate and the work was supposed to be in progress after sanction of the plans.

9. It is their case that thereafter on 21st March 1997, the Official Liquidator has taken over the property and put up his seal by way of attachment thereof. The aforesaid are the submissions in Company Application No.99 of 1997 which is affirmed by one N.P.Patel, Director of the applicant company.

10. In Company Application No.524 of 1997, it is contended in rejoinder filed by this very N.P.Patel (on page No.2 thereof) as follows:

"I state and submit that in para 4 (b) of the affidavit in rejoinder, the company has specifically pointed out that at the time when the agreement for sale, supplementary agreement and the Deed of Conveyance were executed, the present shareholders and Directors were nowhere in picture".

The documents concerning transfers of the shares have been annexed to this affidavit which show that the present group of directors have bought their shares during the period 10.10.1994 to 15.6.1996. Thus, through this rejoinder a plea is taken that the present directors are not bound by what was done by the erstwhile directors of Rushvi Ltd. thereby contending that they are not to be made to suffer. As stated above, in Company Application No.99 of 1997, it has been already contended specifically that the original transaction itself was a bona fide transaction and the applicant company is a bona fide purchaser for value.

11. Similar is the plea of Rutuja Ltd., applicants in Company Applications Nos.189 of 1997, 205 of 1997 and 559 of 1997. In the affidavit of one Dhanesh Badarmal Jain, a director of this applicant company, in support of Company Application No.189 of 1997, it is stated that, by an agreement dated 14th June 1988, Shri Ambica Mills Ltd. (now in liquidation) entered into an agreement to sell a parcel of land admeasuring 9215 square metres at the rate of Rs.650 per square metre for a total price of

Rs.59,89,750. Out of this amount, the earnest money of Rs.5,98,975 was paid by a cheque dated 14th June 1988. From the remaining amount, a further payment of Rs.50,000 was made by a cheque on 13th June 1990 and payment of Rs.48,91,544 was made on 26th July 1990. As in the case of Rushvi Ltd., in this case also, the balance amount is said to have been paid in cash for the purpose of purchase of stamps and other legal expenses.

12. This applicant also states that the permission under the Urban Land (Ceiling & Regulations) Act, 1976 was obtained as also the permission of the Income Tax authorities. The conveyance was duly registered. The plans for further constructions have been approved. The land is entered in the name of the applicant in revenue and municipal records. It is further pointed out in support of this application that some 38 buyers of prospective shops have paid some amount to this applicant. It is also contended that the applicants were in possession of the concerned parcel of land and that on 14th May 1997 the Official Liquidator has attached this property. Similar are the averments in Company Application No.559 of 1997 as also Company Application No.205 of 1997.

13. As far as Company Application No.403 of 1998 is concerned, it is filed by M/s. Jain Corporation. In the supporting affidavit, it is stated that the concerned parcel of land admeasuring 1169 square metres has been purchased by this party at a price of Rs.650 per square metre. In para 2 of this application, it is stated that the agreement for purchase was entered into on 16th July 1988 and that agreement has been registered with the Sub-Registrar of Assurances. It is further stated in that para that it was agreed in the said sale agreement that the balance amount was to be paid at the time of execution of conveyance and that pending completion of formalities, the company has handed over possession of that property. In para 3 it is stated that the permission under Section 20 of the Urban Land (Ceiling & Regulations) Act, 1976 has been granted by the State Government on 6th October 1997. In para 5, it is stated that thereafter the property has been attached by the Official Liquidator. As far as this application is concerned, no supporting documents are enclosed therewith.

14. On behalf of the Official Liquidator, a report has been filed in Company Application No.99 of 1997 filed by Rushvi Ltd. opposing the prayers made therein. A similar report has also been filed in Company Application

No.524 of 1997 by the Official Liquidator opposing the prayers made therein.

15. As far as Rutuja Ltd. is concerned, the Official Liquidator has filed his reports in Company Applications Nos.189 of 1997 and 559 of 1997. Though no report has been filed in Company Application No.205 of 1997, the permission to file a suit is opposed.

16. As far as Company Application No.403 of 1998 filed by M/s. Jain Corporation is concerned, it is being taken up along with the Applications filed by the other two purchasers and since no documents are enclosed with the application and since the parcel of land covered in this application forms a part of the same property, this application is also being opposed on the basis of the reports which are filed in the other matters. Mr.Shah, the learned Counsel for Official Liquidator states that the Official Liquidator is adopting the statements made in those reports as far as this matter is concerned and in the event any documents are produced in any higher forum, the Official Liquidator reserves the right to file his detailed report.

17. From amongst the secured creditors, ICICI has filed its reply in the two applications filed by Rushvi Ltd. as well as Company Applications Nos.189 of 1997 and 559 of 1997 filed by Rutuja Ltd. Thereafter, replies and further replies and rejoinders have been filed by the parties concerned.

18. After the aforesaid part of this order was dictated, Mr.Nagarkar has tendered a true copy of the agreement of purchase dated 16th August 1988 in Company Application No.403 of 1998 filed by Jain Corporation and the same is permitted to be placed on record.

19. In the reports which have been filed by the Official Liquidator, two very important developments in connection with this matter have been placed on record. First is that, whereas the main Company Petition No.66 of 1988 was filed for winding up of the company on 12th April 1988, at the same time, a matter between Oil & Natural Gas Commission (ONGC) and Shri Ambica Mills Ltd. (along with other companies was pending before the Hon.'ble Supreme Court of India. An order has come to be passed by the Hon.'ble Supreme Court in that matter, namely, Civil Miscellaneous Petition No.7875-85 of 1987 on 15th April 1987 and an undertaking has been given pursuant thereto by one Prahladbhai S.Brahmbhatt on behalf of Shri Ambica Mills Ltd. on 27th May 1987. The

order and the undertaking indicate that a large amounts were due to ONGC from Shri Ambica Mills Ltd. (along with some other companies) apparently for supply of gas and the ONGC was directed not to disconnect supply of gas subject to an undertaking being given by this mill company (along with others) that they will not charge, encumber or alienate except with the leave of the Supreme Court any of the immovable assets and that they will make their immovable assets available for discharge of their liabilities on account of difference in price of gas supplied to them. The order and the undertaking are very relevant and to make the record complete both of them are being incorporated herein in extenso.

"ORDER: These appeals will be listed peremptorily on July 21, 1987 as the very first case for regular hearing and above all other causes.

We direct that during the pendency of the appeals, the Oil and Natural Gas Commission will not disconnect the supply of gas to the respondents namely the Association of Natural & Gas Consuming Industries of Gujarat, M.S.Jayant Paper Mills Ltd., M/s. Alembic Glass Industries Ltd., M/s. Alembic Chemical Works Company Services Ltd., New India Industries Ltd., Punjab Steel Rolling Mills Pvt. Ltd., Chandan Metal Products Ltd. and Shri Ambica Mills Ltd. Mill No.2 and will continue to supply gas as hitherto charging at the rate of Rs.1000/- for one thousand cubic meters subject, however, to the undertaking by the respondents which has been given and has been accepted here, that the said respondents will not charge, encumber or alienate, except with leave of this court, any of their immovable assets included in the respective undertakings and that they will make their immovable asset available for discharging the respective liabilities on account of the difference in the price of all the gas supplied to and further during the pendency of the appeals as permitted by orders made by the court while disposing of the appeals. The undertaking will be filed within four weeks from today."

20. The undertaking filed by the above-referred Shri Brahmbhatt reads as follows:

"UNDERTAKING

I, Prahladbhai S.Brahmbhatt, do hereby solemnly affirm, undertake and state as under:

1. I am working as Secretary in Shri Ambica Mills Ltd. Respondent No.10 herein which is one of the members of the respondent No.1 i.e. Association of Natural Gas Consuming Industries of Gujarat.
 2. I am conversant with the facts and circumstances leading to the present proceedings and, therefore, I am competent as well as authorised to give this undertaking on behalf of the respondent No.10 company pursuant to their Hon.'ble Court's order dated 15.4.1987 passed in Civil Misc. Petitions No.7875-85 of 1987 in the present civil appeals. I state that the copy of the said order was made available to the respondent No.10 company by the office of this Hon.'ble Court only on 14.5.1987.
 3. I state that respondent No.10 company undertake that none of immovable assets of the company will be further charged and encumbered hereafter with effect from 15.4.1987 i.e. from the date of order of this Hon'ble court except with the leave of this Hon.'ble Court.
 4. I state that respondent No.10 company further undertake not to alienate any of its immovable assets hereafter with effect from 15.4.1987 except with the leave of this Hon.'ble Court. Respondent No.10 company further undertakes to make available all its immovable assets in the event of discharging the liabilities which may arise on account of the difference between the price at which all the gas being supplied in the company during the pendency of the proceedings in this connection and the price which may be determined by this Hon.'ble Court while disposing of the present appeals finally.

Solemnly affirmed on 27th day of May 1987 at
Ahmedabad.

Dated: 27th May 1987 Sd/- P.S.Brahmbhatt,
Secretary".

21. This undertaking given to the Hon.'ble Supreme Court was quite well-known to the directors of the

company and in the audit report of the company for the year 1993-94, it has been specifically recorded at Para No. 4 (iii) as follows:

"The company entered into a Memorandum of Understanding for sale of land admeasuring 18,422 sq. mtrs. on 14th June 1988 for consideration aggregating to 119.74 lacs and handed over the possession. The Conveyance Deed has not been executed due to injunction granted by the Hon.'ble Supreme Court pending the permission under ULC Act from Government of Gujarat and release of charge of financial institution."

In Para No.23 of this report, it is further recorded as follows:

"The company entered into Memorandum of Understanding for sale of land admeasuring 18422 sq. mtrs. on 14th June, 1988 for consideration aggregating to 119.74 lacs and handed over the possession. The Conveyance Deed has not been executed due to injunction granted by the Hon.'ble Supreme Court pending the permission under ULC Act from Govt. of Gujarat and release of charge of financial institution. The part of consideration still receivable has been shown under Schedule 8 of Sundry Debtors - others."

22. The aforesaid entries in the audit report make it clear that though the mill company had entered into a Memorandum of Understanding on 14th June 1988, Conveyance Deed was not executed due to (i) injunction granted by the Supreme Court, (ii) pending permission under the ULC Act from the Government of Gujarat, and (iii) release of charge of financial institution. The same state of facts are reflected in the above-referred Entry No.23. Thus, from the report of the Official Liquidator it is made clear that right at the time when the main company petition for winding up was filed, there was a pre-existing injunction granted by the Hon.'ble Supreme Court restraining the mill company from alienating the assets which was principally for clearing of the dues of ONGC. It is also clear that an undertaking was given to the Hon.'ble Supreme Court in that behalf and it is continued to be reflected in the audit reports of the company including in its report for 1993-94.

23. Along with the report of the Official Liquidator, he has filed a statement signed on 27.3.1997 by one Rajesh Jaykrishna, ex-director of Shri Ambica Mills Ltd.

and in para 2 thereof he has referred to the agreements entered into with the aforesaid three parties and it is further stated that Conveyance Deed could not be executed 'due to technical reasons'. Paragraph (2) of that statement reads as follows:

"The Company had entered into an Agreement for Sale for the following land, situated near Mill premises, including structures etc. wherever applicable and handed over the possession to the respective Buyers but the Conveyance Deed could not be executed due to technical reasons:

- (A) Rutuja Estate & Investment
Pvt. Ltd. Area 9,215 sq.mt.
- (B) Rushvi Estate & Investment
Pvt. Ltd. Area 9,207 sq.mt.
- (C) Jain Corporation Area 1,169 sq.mt.
- (D) Besides, at present some shops are there on some portion of land and they are given on rental basis."

Mr.Shah for the Official Liquidator has also drawn my attention to the annual report for the year 1991-92 wherein at page 7 in para 7 it is recorded as follows:

"The company entered into Memorandum of Understanding for sale of land admeasuring 18422 sq. mtrs. on 14th June 1988 for consideration aggregating to Rs.119.74 lacs and handed over the possession. The Conveyance Deed has not been executed due to injunction granted by the Honourable Supreme Court, pending the permission under ULC Act from the Government of Gujarat and release of charge of financial institution."

Mr.Shah has tendered a copy of the report and the same is taken on record.

24. It is also material to note that the two purchasing parties, namely, Rushvi Ltd. and Rutuja Ltd. have filed photocopies of the Powers of attorney dated 26th July 1990 allegedly given by the company to two individuals who in turn entered into the conveyance with the said two companies. It is material to note that both these powers are signed by above-referred Rajesh Jaykrishna on behalf of the mill company. Thus, what is relevant is that the mill company was subject to an injunction granted by the Supreme Court on 15th April 1987; they gave an undertaking in accordance with that

order on 27th May 1987; and they recorded in their audit reports in 1991-92 and 1993-94 that in view of the injunction of the Hon.'ble Supreme Court, conveyance of the property could not be executed. That is also indicated in the statement given to the Official Liquidator by aforesaid Rajesh Jaykrishna as recently as on 27th March 1997, whereas this very Rajesh Jaykrishna has signed the Power of attorney allegedly on behalf of the company authorising conveyance.

25. From amongst the creditors, ICICI is one which had sanctioned a loan of Rs.100 lacs which came to be disbursed (the total liability to ICICI comes to Rs.150 lacs which includes amount of interest as well). By an Indenture of contributory mortgage dated 20th January 1984 between Shri Ambica Mills Ltd. and ICICI (amongst others), this amount was secured by creating a mortgage in favour of ICICI (and other creditors). By the said mortgage, the entire land and property of Unit No.1 situated in T.P.Scheme No.7 (excluding a part admeasuring 5810 square metres held by a Chemical Division) and the property in T.P.Scheme Nos.16 and 9 were mortgaged to ICICI and other creditors. By way of giving adequate security, properties of Mill Nos.2 and 3 were also mortgaged under this very document. The document was registered with the Registrar of Companies on 2nd February 1984 vide Entry No.780 under Section 125 of the Companies Act. This indenture of contributory mortgage has been produced by ICICI and it is on record. On behalf of the two applicants, namely, Rushvi Ltd. and Rutuja Ltd. further documents came to be filed along with their rejoinders, such as, photocopies of Agreement of Sale, supplement to agreement, order passed by the Appropriate authority under the Income Tax Act, irrevocable power of attorney, extracts from the revenue record, electricity bills, order passed by the State Government under Section 20 of the ULC Act and title clearance certificates given by the applicants' advocates.

26. Based on the aforesaid material on record, Mr.Vakharia Senior Advocate and Mr.Soparkar as well as Mr.Nagarkar submitted that all the three applicants are bona fide purchasers for value. As pointed out above, in the rejoinder filed on behalf of Rushvi Ltd., a stand is also sought to be taken by the present directors that what has been done was done by the former directors of their own company; that they are bona fide purchasers of shares of the erstwhile directors and that being so, the sale should be permitted to be validated. It is also sought to be canvassed that the present directors ought

not to be made to suffer because they have paid the share price to the former directors. As far as this part is concerned, that is a matter entirely between the two group of directors with which the company in winding up has nothing to do and hence this submission cannot be carried any further.

27. The alternate submission on behalf of the three parties has been that even the erstwhile directors of these three applicant companies were bona fide purchasers for value and, in fact, in Company Application No.559 of 1997 a copy of the notice given by the applicant's advocate to above-referred Rajesh Jaykrishna and others dated 18th March 1998 is placed on record. In that notice it is alleged that the applicant company has suffered on being misled by Rajesh Jaykrishna and others. As far as this part is concerned, that is a matter between the applicants and above-referred Rajesh Jaykrishna for which they are free to take action against said Rajesh Jaykrishna if in their view he has in any way caused any deception or fraud whereby they have parted with money without getting anything in return.

28. The question for my consideration is as to whether all these pleas of the present directors or their erstwhile predecessors can be taken against the company in winding. Mr.Vakharia as well as Mr.Soparkar pressed into service the above-referred subsequent developments, namely, paying money to the seller as per the agreement. Both of them submitted that they had a certificate of title clearance given by their advocate. They had taken a search in the revenue record and subsequently names of the applicants have been duly entered into the revenue record. It is submitted that they obtained the clearance certificate from Income Tax authorities and also the clearance from the State Government as well under the provisions of ULC Act. It was, therefore, submitted that whatever that was expected was already done and nothing more was expected. As far as this plea is concerned, what is also material to note is that the applicants were given to understand that the property was being sold to the mill company so that the unpaid gratuity of the workers will be paid. That clearly indicates that the mill company was in financial difficulties. It is also material to note that the clearance under the ULC Act given by the State Government was subject to certain conditions and condition No.1 thereof specifically stated as follows:

"In the event the land is under any mortgage, the same will have to be cleared from the concerned

financial institution or no objection certificate will have to be obtained from them."

In view of the above-referred two salient features, any party putting in so much money would have looked into the annual reports of the company which was selling the land. Any prudent buyer would have made this necessary inquiry. It is the responsibility of the buyer to make all these necessary inquiries and he having not done the same cannot turn back later on and say that whatever he has done is an act in good faith or that he is a bona fide purchaser for value. A party which fails to make necessary inquiry is deemed to have a notice of previous developments as provided in Section 3 of the Transfer of Property Act and it cannot later on be permitted to set up any such plea saying that it was a bona fide purchaser. By merely saying that one is a bona fide purchaser one does not become a bona fide one. The observations by a Single Judge of this court in the case of JESINGJI KHODAJI v. RAMESHCHANDRA KANTILAL SHAH reported in 13 (1972) Gujarat Law Reporter at page 773 in this behalf are also to similar effect. In case of purchase of property from a public limited company, the first thing that a purchaser would be expected to look into would be the audit reports and have an inspection of the files of the Company with the Registrar of Companies, and will ask for the statement of accounts of such a company. Apparently, this has not been done by any of the purchasers. This they should have and could have done at the time of signing the agreement for sale and, in any case, at the time of conveyance. That having not been done, these pleas cannot be entertained against the company in winding.

29. The next question to be considered is whether the alleged power of attorney given by Rajesh Jaykrishna can bind the company. Mr. Shah, learned Counsel appearing for the Official Liquidator relied upon Section 293 (1) (a) of the Companies Act which specifically requires that in the event any undertaking of the company is being sold, that will have to be done with the consent of the public company in a general meeting and then only the Board of Directors can take any such steps. This Section 293 (1) (a) reads as follows:

"293. Restrictions on powers of Board - (1) The Board of directors of a public company, or of a private company which is a subsidiary of a public company, shall not, except with the consent of such public company or subsidiary in general meeting -

(a) sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company, or where the company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking."

Mr.Shah and Mr.Buch drew my attention to the Agreement of Sale entered into on behalf of the mill company. As far as Rushvi Ltd. is concerned, the property which was sought to be sold is described on page 3 of that document in Gujarati and it includes "bungalow, godown, chawls, out-house and other constructions etc. situated on the concerned land". As far as Rutuja Ltd. is concerned, the property which is said to be sold is a land admeasuring 9215 square metres including "factory and shed and other constructions". Nobody can possibly say that factory or godowns of the mill company are not a part of the undertaking of the mill company. Shri Ambica Mills Ltd. was an integrated textile mill and its principal activity was production of cloth through its factory. The raw material as well as the finished products would be stored in its godowns. The factory and the godowns are essential parts of the undertaking of the mill company. By no stretch of imagination can it be said that it does not form a part of the undertaking of the mill company as was sought to be canvassed by Mr.Soparkar. This being the property which was sought to be sold and since no resolution passed in the general meeting is produced authorising directors or said Rajesh Jaykrishna giving any such power of attorney, anything done by any purchaser in furtherance of that power of attorney cannot bind the mill company. In fact, when the purchasers knew that they were buying the land with factory and the godown it was expected of the purchasers to insist on the legal compliance of there being a necessary resolution to support the power of attorney. Inasmuch as there was no such resolution, any act by the purchaser in pursuance of that power of attorney and any payment made by the purchaser to any such persons cannot bind the mill company. What would be required in a situation like this under Section 293 (1) (a) will be a resolution passed in the general meeting authorising the board of directors to sell such property, a decision of the Board of Directors in furtherance thereof deciding to give the power to somebody to execute the necessary document and thereafter power of attorney narrating therein that it has been given in pursuance to the general meeting resolution and the decision of the Board of Directors. In the instant case, neither of the three

requirements are fulfilled.

30. All these present applications are filed under Section 536 (2) of the Companies Act to validate the actions on behalf of the company. Section 536 (2) reads as follows:

"In the case of a winding up by or subject to the supervision of the court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

This section makes it very clear that in the case of winding up under the orders of court, any disposition of property of the company after commencement of the winding up is void unless the court orders otherwise. Commencement of winding up proceeding is defined in Section 441 (2) of the Companies Act as deemed to have been commenced at the time of presentation of the petition for winding up. In the instant case, winding up petition was filed on 12th April 1988. Prior thereto, there was a pre-existing injunction of the Hon.ble Supreme Court and an undertaking given over there. Much thereafter, the Agreements to Sell and the Conveyances have been executed in the year 1988 and 1993 respectively. Obviously, unless the court approves them they would be void. Now, if the court approves them, it will require the court to depart from its normal rule which provides that, after commencement of winding up proceeding all assets of the company would be frozen and they will not be tampered with. Section 531 (1) deals with this aspect of the matter. It says that any transfer of property, movable or immovable, by or against a company within six months before the commencement of its winding up shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly. This being the position, the applicants must show compelling circumstances for taking any such view. In fact, in the case of NAVJIVAN MILLS LTD reported in 59 (1986) Company Cases 201, a Division Bench of this court has observed at page 214 as follows:

"It is well settled on matter of principle and authority that if the company court is satisfied that a particular disposition of the property of a company which is the subject matter of a

winding up petition, is necessary or expedient in the interest of the company and particularly its creditors and shareholders and the transactions are in the ordinary course of its current trade bona fide entered into and completed, and it is in the interest of every one to preserve the company as a going concern, and if such transactions are not maintained, and the presentation of the petition groundless or well-founded would result ipso facto into paralysing the trade of the company and a great injury without any counter-balance of advantage would be done to those interested in the assets of the company, it would be in the discretion and duty of the court to validate such transactions."

31. This makes it clear that, if at all any such discretion is to be exercised, the decision has to be in ordinary course of its current trade. The aforesaid observation also indicates that what is to be taken into consideration is the interest of everyone to preserve the company as a running concern. In the instant case, what was happening was to the contrary. The factory, godown and the land of the mill company were being sold. The requirement of paying gratuity of the employees is sought to be taken, but one is not sure as to whether the workers had been paid their gratuity. Mr.Vasavada appearing for the Textile Labour Association states that no such payments have been made to any of the employees from the amounts which are allegedly collected by and on behalf of the mill company. Thousands of workers are waiting to receive their unpaid dues for years together. Merely because now some construction is sought to be put up by collecting some money from some individuals, the breach of the ULC order and the breach of the provisions of the company law cannot be cured. Last but not the least, there is the question of obedience to the order passed by the Supreme Court. As has been seen above, this is a glaring case where a clear undertaking was given to the Hon.'ble Supreme Court and that appears also to have been recorded in the annual reports of the company and yet one of the directors has allegedly sold the land by entering into some documents with third parties without obtaining leave from the Hon.'ble Supreme Court which was the least that was expected. In fact, in view of the wording of the order passed by the Hon.'ble Supreme Court, as far as the company is concerned, it was bound by that order and ought to have obtained leave of the Hon.'ble Court. This fact was known to Mr.Rajesh Jaykrishna which can be seen from his own signed statement which is filed before the Official Liquidator

as recently as on 27.3.1997. It is also clear from the lawyer's notice given by Rutuja Ltd. that they are in any case alleging deception by the said Rajesh Jaykrishna. If this is the state of affairs, it is nothing but a transaction which is based on fraud. Inasmuch as the ICICI and the other creditors had a charge over the entire property under consideration unless their claims were satisfied (which was also the requirement under the ULC order) such sale could not have proceeded further. In the case of S.P.CHENGALVARAYA NAIDU v. JAGANNATH reported in (1994) 1 SCC 1 where a decree was obtained for non-disclosure of relevant documents, the Hon.'ble Supreme Court held that it was a fraud on the court and fraud vitiated all such acts based thereon. As the Court noted with approval, " 'Fraud avoids all judicial acts, ecclesiastical or temporal' observed Chief Justice Edward Coke of England about three centuries ago."

32. In the present case, the applicants representing Rutuja Ltd. have alleged deception and fraud by Rajesh Jaykrishna and others. It will be for them to take appropriate action against them. As far as any rights which are sought to be based on documents entered by fraud is concerned, a court cannot enforce it. Apart therefrom, it would also amount to granting certain reliefs in the teeth of the injunction granted by the Supreme Court which will be contrary to the orders of the Supreme Court and not expected from any judicial forum.

33. As far as Application under Section 536 (2) is concerned, bona fides have to be from both the sides, purchasers as well as sellers. In the instant case, the purchaser himself is saying that the seller did not have bona fides. That being the position, this is not a case where a discretionary order can be passed as prayed under Section 536 of the Act.

34. Mr.Trivedi appearing for Bank of India as well as Union Bank states that a fiduciary responsibility was cast on the directors of the company when they had given an undertaking to the Supreme Court. He submits that a right created by a document which is executed in violation of that undertaking cannot be enforced by a court of law.

35. In the circumstances, for the reasons stated above, I hold that the alleged Power of attorney given by Rajesh Jaykrishna does not bind the company in liquidation since it is in breach of the undertaking given to the Hon.'ble Supreme Court and for

non-compliance of Section 293 (1) (a) of the Companies Act, 1956 apart from being in breach of the expressed stipulation in the clearance given by the State Government under the provisions of the ULC Act. No rights can flow therefrom as against the company and the sale-deeds executed on the strength thereof cannot be enforced against the company. The possession by the Official Liquidator of these properties is perfectly legal and justifiable. In the circumstances, no declaration as sought by the applicants that they are bona fide purchasers can be given nor can the Official Liquidator be directed to lift his attachment on the company's property. Similarly, no suit can lie to enforce these documents against the company.

36. Before I part with the matter, there is one more aspect which is required to be dealt with. During the course of these proceedings, it was represented earlier to my brother M.S.Shah, J. that the applicants would be ready to buy these properties if they are sold by auction. Accordingly, an order was passed by Shah J. on 7th October 1998. There was a controversy as to for what purpose that order was passed. It was submitted by Mr.Soparkar that that order was clearly for sale of the property whereas Mr.Shah and Mr.Buch submitted that the order was passed so that one knows what is the price that this property is likely to fetch. This order was passed by Shah, J. in view of an earlier order passed by Balia, J. on 27th July 1998 calling for valuation of the property concerned. ICICI had submitted its valuation on 11th September 1998 which roughly indicated that either of the two parcels of land which were sought to be sold to Rushvi Ltd. and Rutuja Ltd. would fetch approximately two crores of rupees. As against that, Mr.Soparkar and Mr.Vakharia had got the valuation done through their valuers which indicated that the parcels of land would fetch value in the range of Rs.60 lacs each. The advertisement was directed in view of the apparent disparity in the valuation by ICICI and the valuers of Rushvi Ltd. & Rutuja Ltd. The advertisement was given by ICICI and bids were invited. Rushvi Ltd. & Rutuja Ltd. are the highest bidders (whose bids are in the range of Rs.60 lakhs). Mr.Vakharia and Mr.Soparkar submit that the same be accepted. Their submission cannot be accepted. The advertisement had not given any upset price and it was apparently only for assessing the market situation. In any event, that was an exercise during the pendency of these applications just to find out what would be the price of the property. The applicants are certainly not ready to buy the property at rupees two crores and in the circumstances the

advertisement which was issued has failed. The property will be advertised for sale later on during the course of further steps in the main winding up petition.

37. In the circumstances, all these applications, namely, Company Applications Nos.99 of 1997, 524 of 1997, 189 of 1997, 559 of 1997 and 403 of 1998 are rejected. All the applicants will pay costs of Rs.5,000/- (rupees five thousand) per application (except Company Application No.403 of 1998) to the Official Liquidator. No costs are awarded in Application No.403 of 1998 since it is rejected before issuing notice.

38. Company Application No.205 of 1997 which seeks leave to file suits under Section 446 of the Companies Act is also rejected.

39. All interim orders stand vacated. The Official Liquidator will be at liberty to take further steps in accordance with law. I.C.I.C.I. is directed to refund the earnest amounts received from the bidders.

40. Mr.Mehta, Mr.Soparkar and Mr.Nagarkar apply for stay of this order for six weeks. That request is rejected.

41. All the applications are disposed of as above.

(KMG Thilake)

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